Vol 311

Office - Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 357

ALVA B. DAVIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 357

ALVA B. DAVIS,

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THE UNITED STATES OF AMERICA.

PETITION.

To the Honorable, the Supreme Court of the United States:

Comes Now petitioner, Alva B. Davis, appellant below, and petitioning for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

Statement of the Case.

This is a mail fraud case. On October 3, 1939, appellant, with one L. J. Summerfield, was convicted in the United States District Court for the Northern District of Texas, at Dallas, on all counts, except the fifth, of an indictment containing fourteen counts (R. 60). Thirteen counts charged use of the mails in furtherance of a scheme to defraud (18

U. S. C. A. 338). The fourteenth count charged a conspiracy (18 U. S. C. A. 88) to commit the several substantive offenses outlined in the preceding thirteen counts (R. 1-44). The scheme alleged, in substance, as we understand it, that the defendants would acquire waste lands in Brewster and Presidio counties, Texas, at $1.00 and $1.50 an acre and sell and offer it for sale for $10.00 an acre, and make false representations concerning the lands, and would falsely represent (R. 7 (1)) that the lands were Texas oil lands and valuable Texas ranch properties, when in truth they were not, but were waste lands, unfit for any purpose, which had been acquired for $1.00 and $1.50 an acre and were being sold for $10.00 an acre; and would falsely represent (R. 7 (2)) that the sale of the lands carried with it all surface and mineral rights, when in truth the mineral rights to many tracts had been reserved and were held by the State of Texas; and would falsely represent (R. 7 (3)) that the lands were well worth the price the purchasers were paying for it, $10.00 an acre, and that extensive oil development was under way in Brewster and Presidio counties, when in truth the land was worthless as an investment and there was no development of any character in the area in which the land was situated, and there was no justification in the claim that the land was worth the price the purchaser was paying for it, $10.00 an acre, but on the contrary, the land was hilly, waste land which had been purchased shortly prior thereto at $1.00 and $1.50 an acre; and would falsely represent (R. 8 (4)) that the land was highly productive and suitable for the growing of various crops and fruits, when it was not, but on the contrary, the lands were absolutely barren and would not produce any character of vegetation, and that the lands (R. 9) were worthless as a basis for investment, as the defendants well knew; and that the defendants were not conducting and would not conduct a business and enterprise in good faith, but on the contrary, were

knowingly conducting a mere dishonest and fraudulent land selling scheme and were engaged in practices and a course of business which would and did operate as a fraud and deceit upon the persons to be defrauded. It was alleged that there were other misrepresentations made, such as the identity of the officers of the organization. There was a single fraudulent scheme charged; each of the thirteen counts merely involved the mailing of a different letter. The first count was based upon a letter to Walter L. Bryan, Drew, Mississippi. The second count involved the mailing of a letter to Mrs. Nora M. H. Hartman, Troy, Kansas. The third count involved the mailing of another letter to Mrs. Hartman. The fourth count involved the mailing of another letter to Mrs. Hartman. The fifth count involved the mailing of a letter to Miss Sadie M. Huber, Hamilton, Ohio. She was not used as a witness and petitioner was acquitted of that count. The sixth count involved the mailing of a letter to Emil Kollert, Royal Oak, Michigan. The seventh count involved the mailing of another letter to Kollert. The eighth count involved the mailing of a letter to George Roulet, New Iberia, Louisiana. The ninth count involved the mailing of a letter to W. M. Springer, Clarksdale, Mississippi. The tenth, eleventh, twelfth and thirteenth counts involved the mailing of four different letters to Mrs. Agnes Schrader, New York. The fourteenth count is the conspiracy count.

The indictment was returned on September 21, 1939 (R. 44). Defendant was arraigned on September 23, and the case was set down for trial September 27, 1939. We did not participate in the trial of the case and assume that the recitations in the record are true.

On the 23rd day of September, 1939, defendant filed a motion for continuance, alleging, among other things, that because of the nature and extent of the charges in the in-

dictment, he could not properly prepare for trial within the time allowed and that, in order to properly make his defense, it would be necessary for him to summon witnesses and that he was not able to procure such witnesses at the term (R. 54). The motion was overruled (R. 57). Later the case was reset for October 2, 1939, and although it does not appear in the bill of exceptions, it was alleged in his notice of appeal (R. 63) and in the assignments of error (R. 92 & 93) that on that date the defendant renewed his motion for continuance supplementing it with allegations that he had caused subpoenas to be issued to several named witnesses and that the United States Marshal made diligent effort to secure said witnesses but was informed that the parties sought were temporarily out of the city. He alleged that these absent witnesses had been his agents in selling the lands and that they would, if present, testify that they were acquainted with the instructions given by petitioner to his agents, and that it was his policy to always instruct his agents never to misrepresent the value, location and prospects of the land sold; that he could not safely go to trial without said witnesses, and that he had no other witnesses present for the trial by whom he might make this proof; and that the motion was overruled (R. 93). The petitioner was put to trial on October 2, 1939 (R. 97).

The case was tried before the Honorable William H. Atwell, sitting without a jury, and, upon conviction, the petitioner was sentenced to two years in the penitentiary and to pay a fine of $5,000.00 (R. 68).

Statement as to Jurisdiction.

Petitioner appealed from the judgment of conviction to the Circuit Court of Appeals for the Fifth Circuit and that court on June 8, 1940, affirmed the judgment of the trial court, and on August 2, 1940, denied, without opinion, petition for rehearing (R. 563).

Jurisdiction of this cause is conferred upon the Supreme Court by Section 347a, U. S. C. A., Title 28. The opinion of the Circuit Court of Appeals appears in the Appendix.

Questions Presented.

1. *Whether the trial court abused its discretion in overruling petitioner's motion for continuance and putting him to trial in eleven days after indictment, at a time when he was unable to procure the attendance of witnesses he relied upon to assist in establishing his good faith in connection with the sale of his lands.*

This was assigned as error below (R. 89-93) and argued (appellant's brief, pp. 63 & 64). This was one of the errors assigned which the Circuit Court of Appeals characterized as purely technical and not affecting appellant's rights, and without merit.

2. *Whether the Circuit Court of Appeals deprived petitioner of his right to a review by failing or refusing to examine the record to determine whether there was any evidence to support the conviction.* In this connection, petitioner desires to point out that in the opinion the Circuit Court said:

> "The printed record consists of some 550 pages, but we will not attempt to review the evidence as it is not suggested it was insufficient to support the conviction. The errors assigned are purely technical and do not affect the substantial rights of appellant. Furthermore, they are without merit.
>
> The record presents no reversible error. 28 U. S. C. A. § 391."

Petitioner is unable to determine from this language whether the court meant to say that it had not examined the record to determine whether there was evidence to support the judgment, or that it had examined the record and

found evidence to support the judgment. The insufficiency of the evidence was urged in the brief as Point 9 of "Points Relied Upon" (appellant's brief, pp. 26 & 27), and argued (pp. 69 & 70). It is true that a complaint as to the insufficiency of the evidence was not included in the "Assignments of Error". In petitioner's petition for rehearing he called the court's attention to the fact that he did claim, in presenting his appeal, the evidence to be insufficient (Par. 3, petition for rehearing, R. 560), and specifically pointed out wherein there was no evidence (R. 560-561). The court denied the petition without comment. If the court, by the quoted part of the opinion above, said or meant to say that it did not review the evidence because it was not suggested it was insufficient to support the conviction, it erred to the prejudice of petitioner and deprived him of his right of review.

3. *Whether there was any evidence to support the conviction.* Specifically, petitioner contends: (a) That the essence of the indictment was that the defendants would sell waste lands by means of false representations, and there was not a scintilla of evidence that any of the lands sold or offered for sale were waste lands, no one testified and there was no other evidence offered showing or tending to show the location, value or character of any land sold or offered for sale. (b) That the substantial misrepresentations charged in the indictment were, (1) that the lands were Texas oil lands and valuable Texas ranch properties, whereas, the indictment charged, they were waste lands, unfit for any purpose; (2) that the sale of the lands carried with it all surface and mineral rights, whereas, the indictment charged, the mineral rights to many tracts had been reserved and were held by the State of Texas; (3) that the lands were well worth what the purchasers were paying for them, and that extensive oil development was under way in Brewster and Presidio counties, whereas the

indictment charged, the land was worthless as an investment and there was no development of any character in the area in which the land was situated, that there was no justification in the representation that the lands were worth the price the purchasers were paying for it, because the land was hilly, waste land; (4) that the lands were highly productive and suitable for the growing of various crops and fruits, whereas, the indictment charged, the lands were absolutely barren and would not produce any character of vegetation. There was no evidence offered which showed or tended to show that any of the above representations were false as charged. (c) There is no evidence in this record that petitioner authorized the agent, Summerfield, or any other person, to make the false representations as to the lands being highly productive and suitable for various crops and fruits, and that purchasers would receive quick and substantial profits upon their investments, and that there were prospects for enormous dividends and profits. If the Circuit Court of Appeals by the quoted part of the opinion above said or meant to say that it had examined the record and found evidence to support the conviction, it erred to the prejudice of petitioner, because there is no evidence in the record to support the charge as made.

Reasons Relied Upon for the Allowance of the Writ.

1. In holding that petitioner's assignment of error as to the action of the trial court in overruling his motion for continuance was purely technical and did not affect any of petitioner's substantial rights, the Circuit Court of Appeals decided an important question in the administration of federal criminal justice in a way in conflict with the applicable decisions of the Supreme Court, and particularly in conflict with the decision in *Bruno* vs. *United States*, 84 L. Ed. 158, Advance Opinion No. 3, October Term, 1939.

2. In holding that there was no merit in petitioner's complaint as to the action of the trial court in overruling his motion for continuance, the Circuit Court of Appeals sanctioned a clear abuse of discretion by the trial court, which seriously infringed petitioner's right to a fair trial and an opportunity to present his defense, and decided an important question of general law in a way untenable and in conflict with the weight of authority. Cf. *Younge* vs. *United States,* 223 Fed. 941; *Paoni* vs. *United States,* 281 Fed. 801. And see *C. J. S. Continuances,* § 46; *U. S.* vs. *Phelps,* 8 Pet. (U. S.) 700, 8 L. Ed. 1094; 12 *Am. Jur. Continuances,* § 23.

3. In holding that petitioner did not question the sufficiency of the evidence to support the conviction and refusing to review the evidence, the Circuit Court of Appeals deprived petitioner of a valuable right of review, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

4. In holding, if indeed it has held, that the evidence was sufficient to support the judgment of conviction, the Circuit Court of Appeals has sanctioned a deprivation of petitioner's liberty and property without due process of law, and has sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify to this Court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket No. 9293, *Alva B. Davis* vs. *United States of America,* and that the judgments of the Circuit

Court of Appeals and of the District Court may be reversed; and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted.

W. B. HARRELL,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 357

ALVA B. DAVIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

SUPPORTING BRIEF.

To the Honorable, the Supreme Court of the United States:

In support of his petition for writ of certiorari, the petitioner respectfully shows to the Court:

I.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals in this case has not yet been reported, but appears in the record at pages 556 and 557, and in the Appendix hereto. The trial court filed no opinion.

II.

Jurisdiction.

(a) The opinion below was handed down on June 28th, 1940; petition for rehearing was denied on August 2nd, 1940.

(b) This Court has jurisdiction under 28 U. S. C. A. § 347(a).

(c) The jurisdiction of this Court is invoked upon the following grounds:

1. In holding that petitioner's assignment of error as to the action of the trial court in overruling his motion for continuance was purely technical and did not affect any of petitioner's substantial rights, the Circuit Court of Appeals decided an important question in the administration of federal criminal justice in a way in conflict with the applicable decisions of the Supreme Court, and particularly in conflict with the decision in *Bruno* vs. *U. S.*, 84 L. Ed. 158, Advance Opinion No. 3, October Term, 1939.

2. In holding that there was no merit in petitioner's complaint as to the action of the trial court in overruling his motion for continuance, the Circuit Court of Appeals sanctioned a clear abuse of discretion by the trial court which seriously infringed petitioner's right to a fair trial and an opportunity to present his defense, and decided an important question of general law in a way untenable and in conflict with the weight of authority.

3. In holding that petitioner did not question the sufficiency of the evidence to support the conviction and refusing to review the evidence, the Circuit Court of Appeals deprived petitioner of a valuable right of review, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

4. In holding, if indeed it has held, that the evidence was sufficient to support the judgment of conviction, the Circuit Court of Appeals has sanctioned a deprivation of petitioner's liberty and property without due process of law, and has sanctioned such a departure by the trial court from

the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

III.

Statement of the Case.

The Motion for Continuance. The indictment was returned on September 21, 1939, at a special term of the United States District Court for the Northern District of Texas, at Dallas (R. 1). It consisted of fourteen counts and contained more than thirty pages (R. 1-44). The first thirteen counts charged that petitioner and one L. J. Summerfield devised a scheme and artifice to defraud the several persons named in the indictment and others who could be induced to invest their moneys and properties in lands situated in Brewster and Presidio counties, Texas (R. 2). The scheme in substance, as alleged, was that the defendants would purchase waste lands in the counties aforesaid at a price of $1.00 and $1.50 per acre and by the use of highly colored and distorted maps of the counties and by false representations as to the character and value of the lands, would sell them to the persons to be defrauded at $10.00 per acre (R. 5-7); that by various means the defendants would represent and induce the persons to be defrauded to believe that the lands offered for sale had valuable oil and mineral possibilities and were fit for and adapted to agriculture and ranching, when as a matter of fact, the indictment alleged, the lands were waste and unfit for any purpose and wholly worthless as an investment (R. 6-8). It was further charged that "defendants were not conducting and would not conduct a business and enterprise in good faith, but on the contrary, said defendants were knowingly conducting and continued knowingly to conduct a mere dishonest and fraudulent land selling scheme, and were engaged in practices and a course of business which

would and did operate as a fraud and deceit on the persons to be defrauded" (R. 9). The scheme was particularly outlined in Count 1 of the indictment and referred to in the remaining counts. Each of the first thirteen counts charged the use of the mails in furtherance of the aforesaid scheme. The fourteenth count charged a conspiracy to commit the several substantive offenses charged in the preceding thirteen counts (R. 41).

Petitioner was arraigned on September 23, 1939, and the case set down for trial September 27, 1939 (R. 58). On the 23rd of September, 1939, petitioner filed a motion for continuance, alleging, among other things, that he was charged with selling lands which were worthless, representing them to be valuable, when they had no value as oil, gas or other mineral properties, which necessitated the negativing of the allegations, and that it was impossible for him to secure such proof in so short a time (R. 55). This motion was overruled on September 23, 1939 (R. 57). The case was later reset and called for trial on October 2, 1939 (R. 97).

It is set out in petitioner's notice of appeal (R. 63) and in the assignment of errors (R. 92 & 93), that on the 25th of September, 1939, petitioner caused subpoenas to be issued for witnesses, W. A. Craddock, C. D. Fromme, I. W. Queal, D. Sharp, Allen Graham, Wilbur Sweeten, Ronne McCorkle, E. G. Dean, E. E. Hundley and W. Wilson Graham, all of Dallas, Texas, to appear as witnesses in petitioner's behalf on September 27; that the United States Marshal made diligent effort to secure said witnesses but was informed that they were temporarily out of the city; that petitioner continued his efforts to locate and secure the presence of said witnesses for the trial, but was unable to do so (R. 92); that when the case was called for trial on October 2, none of the witnesses appeared (R. 93) and "in open court the defendant renewed his motion for continuance, alleging and set-

ting out the effort he had made to secure their presence for the trial of the cause, and alleging and setting out that they had been agents, selling land for defendant, A. Brown Davis, in a legitimate manner, and that they would, if present, testify that they were acquainted with the instructions given to agents by the said A. Brown Davis, and that it was the policy of the said A. Brown Davis to always instruct his agents never to misrepresent the value, location and prospects of the land sold by him and involved in this indictment, that he could not safely go to trial without said witnesses, and that he had no other witnesses present for trial of said cause by whom he might make this proof, which said motion for continuance so made and renewed the court then and there overruled and to which said action of the court the defendant then and there excepted".

The matters set out in the foregoing paragraph do not appear as a part of the bill of exceptions, and we do not find a formal motion containing the allegations referred to nor an order of the court overruling such motion, with exception.

The Sufficiency of the Evidence. For a statement of the character of the charges in the indictment, reference is made to the foregoing statement.

None of the persons alleged to have been defrauded testified that they had seen the lands and, of course, made no effort to put a value on it. The only witness introduced by the government who testified that he was familiar with Brewster and Presidio county lands was Otis Turner, a real estate man who lived in Alpine in Brewster County (R. 355). He testified that approximately a hundred wells had been drilled in the two counties for oil, but that none of them were producing. He said he knew of no agricultural products of the type which the indictment alleged defendants had represented the lands were adapted to produce

having been grown in either of the counties (R. 357). He testified that there was some drilling for oil in one of the counties at the time of the trial (R. 360), and that considerable acreage was held by various major oil companies (R. 361). He testified that at one time he sold petitioner a tract of land for $1.15 per acre and, in his opinion, that was all that particular tract was worth (R. 358). He testified that he knew of nothing that was going on at the time of the trial or that had been going on for the past three years that would cause land in either Brewster or Presidio County to be worth $10.00 per acre (R. 362).

J. W. Frazier, a witness for the defendant, testified that he was County and District Clerk of Brewster County (R. 375). He admitted on cross-examination by the District Attorney that he knew of no grapefruit being grown in either of the counties; and did not know of any cotton or sweet potatoes having been grown on any of petitioner's land; upon being handed photographs by the District Attorney (R. 383-385), he testified that Block G-12 of Brewster County, in which block the petitioner owned some land (R. 378), resembled the country depicted in the photographs (R. 381). He testified on cross-examination that cotton and sweet potatoes did grow in certain portions of Brewster and Presidio counties (R. 379) and in reply to a question by the judge said he had seen oranges growing in Presidio County just over the line (R. 388). He testified that when some of the oil wells were being drilled, there was considerable activity in the purchase and sale of royalties (R. 386); that the Atlantic Oil & Refining Company owns about 27,000 acres in Brewster County in fee (R. 386); and that Humble Oil & Refining Company has about 40,000 acres leased (R. 386).

Dr. P. E. Shershet, a witness for the defendant, testified that he was a mining engineer. In response to questions

by the District Attorney on cross-examination, he testified that he had made surveys in Brewster and Presidio counties; that he could not then say whether he would recommend the counties as a place to invest money or not (R. 395); that he was not qualified to make any estimate of the values of the lands in those counties (R. 397); that all the formations that produce oil in the Pecos area are present in the two counties (R. 398).

IV.

Specifications of Error.

1. The trial court abused its discretion in overruling petitioner's motion for continuance and putting him to trial in eleven days after indictment, at a time when he was unable to procure the attendance of witnesses he relied upon to assist in establishing his good faith in connection with the sale of his lands, and the Circuit Court of Appeals erred in holding that petitioner's complaint in this regard was without merit, purely technical and involved no substantial right of petitioner.

2. The Circuit Court of Appeals erred in refusing to examine the record to determine whether there was any evidence to support the conviction.

3. The Circuit Court of Appeals erred in holding that the record presents no reversible error, because the record clearly reveals that there was no evidence to support the conviction.

V.

Argument.

On the Motion for Continuance. Of course, a motion for continuance is addressed to the sound discretion of the trial court, whose action thereon will not be disturbed unless there is an abuse of discretion. But a defendant is entitled

to opportunity to make his defense; there is nothing technical about it—it is a substantial right. If the matters set out in the petitioner's notice of appeal and assignments of error concerning his motion for continuance alleged to have been presented on October 2, 1939, can be considered for any purpose, we think it is clear that the trial court did abuse its discretion in putting the petitioner to trial on October 2nd, and that the error was so prejudicial as to require reversal. Petitioner was charged with selling and offering to sell lands by making false representations as to their value and character, and that he was not conducting a business in good faith, but was conducting a mere dishonest and fraudulent land selling scheme which operated as a fraud and deceit upon people. He said he could show by his agents or salesmen, if they were present, that they were acquainted with the instructions he gave them and that it was his policy to always instruct them never to misrepresent the value, location and prospects of the lands offered for sale; he said he had no other witnesses present by whom he might make this proof. He said he caused subpoenas to be issued for the witnesses, who lived in Dallas, Texas, and they could not be located and were not present for the trial. We submit the testimony of these witnesses was material; that being indicted on September 23, 1939, and having issued his subpoenas on September 25, 1939, he was diligent, and when the trial court overruled his motion for continuance, because of the absence of his witnesses, and put him to trial on October 2, 1939, without his witnesses, the trial court abused his discretion and the petitioner was deprived of a fair opportunity to prepare and present his defense. Especially is this true since the indictment charged that petitioner was not conducting a business and enterprise in good faith, but was conducting a mere dishonest and fraudulent land selling scheme and was engaged in practices and a course of business which

operated as a fraud, and since the indictment and trial were built, as we believe, around the alleged false representations of the agent and defendant, Summerfield, made to Mrs. Nora M. H. Hartman, W. M. Springer, Mrs. Agnes Schrader and F. J. McBride. We think the testimony of the other salesmen as to the course of petitioner's business was material, when it appears that some 25,000 acres of land had been sold to between 900 and 1,100 persons.

On the Sufficiency of the Evidence. We are not unmindful of the fact that usually this Court declines to review evidence—that the volume of work which the Court faces requires it to husband its time. We are perfectly aware that in pressing here for a review of the evidence, we are asking the Court to assume a heavy burden. Nevertheless, we feel compelled to the action. No man, good or bad, ought to be condemned to imprisonment except upon an admission of guilt or upon substantial evidence of the crime charged. If the evidence in the record lacks real substance and amounts to no more than suspicion and surmise, this case ought to be reversed, we think, even though it requires the labors of this Court to do it.

As we have heretofore stated, we have not been able to determine whether or not the Circuit Court of Appeals reviewed the evidence. At the time it delivered its opinion, that Court had the impression that petitioner did not challenge the sufficiency of the evidence. It is true that the challenge was not among the assignments of error. But it did not have to be—if the judgment was without evidence to support it, it was fundamentally erroneous. When the court's attention was called to the supposed defect, we think that unquestionably it was its duty to examine it. In view of the language of the opinion and the fact that the petition for rehearing pointedly directed the court's attention to the lack of evidence and was overruled with-

out comment, we are not certain that the evidence was reviewed.

If we are correct in our conception of the essence of this indictment and if the scheme charged was, as we understand it,—that the defendants would acquire waste lands in Brewster and Presidio counties at $1.00 and $1.50 an acre and sell and offer it for sale for $10.00 an acre, and make false representations concerning the lands sold and offered for sale, and would falsely represent (R. 7 (1) that the lands were Texas oil lands and valuable Texas ranch properties, when in truth they were not, but were waste lands, unfit for any purpose, which had been purchased for $1.00 and $1.50 an acre and were being sold for $10.00 an acre; and would falsely represent (R. 7 (2) that the sale of the lands carried with it all surface and mineral rights, when in truth the mineral rights to many tracts had been reserved and were held by the State of Texas; and would falsely represent (R. 7 (3) that the land was well worth the price the purchasers were paying for it, $10.00 an acre, and that extensive oil development was under way in Brewster and Presidio counties, when in truth the land was worthless as an investment and there was no development of any charcter in the area in which the land was situated, and there was no justification in the claim that the land was worth the price the purchaser was paying for it, $10.00 an acre, but on the contrary, the land was hilly, waste land which had been purchased shortly prior thereto at $1.00 and $1.50 an acre; and would falsely represent (R. 8 (4) that the lands were highly productive and suitable for the growing of various crops and fruits, when it was not, but on the contrary, the lands were absolutely barren and would not produce any character of vegetation, and that the lands (R. 9) were worthless as a basis for investment, as the defendants knew, and that defendants were not conducting and would not conduct a business and enterprise

in good faith, but on the contrary, were knowingly conducting a mere dishonest and fraudulent land selling scheme and were engaged in practices and a course of business which would and did operate as a fraud and deceit on the persons to be defrauded—then we are in position to state to the Court that we have carefully examined the record and are entirely convinced that there was no substantial evidence to support the conviction.

We must be entirely frank with the Court. Petitioner's letters were written in an extravagant style, the representations he made were most alluring, and the literature, consisting of the Santa Fe News and other publications, contained articles not prepared by him but which were reproduced and used by him to present to his customers and prospective customers visionary ideas of Texas and its resources. We do not defend the letters, the publications or the representations of petitioner; our position is that, no matter how fraudulent one may surmise a series of acts to be or how repugnant to an enlightened intelligence the reading of petitioner's letters or the literature he sent out may be, he is entitled to a trial upon the issues made in the indictment, and, if the proof offered by the government failed to show that petitioner was guilty of what he was charged with, he should have been acquitted. *Hass* vs. *U. S.*, 93 F. (2d) 427.

It is true that the indictment charged that—"the defendant represented that the land sold and offered for sale carried with it all the surface and mineral rights, when in truth the mineral rights to many tracts had been reserved by the State of Texas"—and that the government showed by its witness, Mrs. Agnes Schrader, that she bought land three or four times, altogether about 430 acres (R. 260-263) and that the lands conveyed to her were out of Survey 26, Certificate 1018, Block 230 Brewster County (R. 308), and that the government showed that Miss Sadie M. Huber pur-

chased land twice, altogether about 57 acres, and that the lands conveyed to her were out of Survey 12, Certificate 962, Texas Central Ry. Survey, Presidio County (R. 285); and it is true that the government showed by its witness, I. A. Walker (R. 343-345), that these two surveys were classified in the Land Office of Texas as mineral and grazing land and sold by the State prior to 1931. If it is true that the minerals were reserved by the State of Texas under these two surveys, we say this is not sufficient to support the conviction, because the petitioner, Davis, bought an aggregate of approximately 30,000 acres of land in Brewster and Presidio counties and conveyed approximately 25,000 acres of it to between 900 and 1,100 persons. If only the two persons named, among the 900 to 1,100 purchasers of lands, acquired their tracts without the minerals, this would in our judgment be insufficient to show that petitioner had a plan or scheme to sell lands and falsely represent that the sale carried the full mineral rights.

It is true that the indictment charged that—"the scheme was to sell lands in Brewster and Presidio counties by making false representations, among others, concerning the profits made and to be made from the purchase of the lands and enormous dividends and profits from the purchase of the lands"—(R. top page 3), and that the government showed by its witness, Mrs. Nora M. H. Hartman (R. 148) that the defendant, Summerfield, a salesman, represented to her (in conversation with reference to her purchase of the land) that she would in a year from then (1936 or 1935) have all kinds of money and that she would not know what to do with it; and that the government witness, Springer (R. 175), said that Summerfield told him (about January, 1939) that the land he bought would be selling for $50.00 an acre in a few months; and that the witness, Mrs. Agnes Schrader, testified (R. 246) that Summerfield told her when she bought 380 acres of land for $3,800.00 (apparently in July, 1938) that in less than six or eight months her invest-

ment would bring her twenty, twenty-five or maybe thirty thousand dollars.

Assuming that these representations were made by the salesman, Summerfield, and that they were false, we believe they are not sufficient to sustain and conviction of petitioner for two reasons: First, petitioner, since he started to selling the lands in Brewster and Presidio counties, some four or five years prior to October, 1939, has sold between twenty and twenty-five thousand acres to between 900 and 1,100 persons (R. 435), and the fact that glowing and extravagant representations as to profits were made by the salesman to three people with reference to the profits to be made from their purchases, would be insufficient to show a scheme to sell lands in Brewster and Presidio counties by making false representations as to the profits to be made; and, second, it is not shown that petitioner authorized or knew that the agent selling the land was making extravagant and false representations as to the profits to be made from the purchase of the land. The petitioner timely and repeatedly objected to the representations made by salesmen as unauthorized (R. 108; R. 147; R. 157; R. 168).

The government does not attempt to show that petitioner authorized or knew that Summerfield was making representations as to the lands being grazing lands or that they would grow oranges and grape fruit, or that enormous profits and dividends would be quickly made from the purchase of this land. The government calls him (R. 528), as Mr. Davis referred to him: "The good will ambassador and the country-wide representative of the company" and, we presume, want it to be inferred or assumed that petitioner knew of these extravagant statements made by the salesman, Summerfield.

Criminal guilt is a personal thing; no one can be deprived of his liberty unless he himself commits the crime or in some way knowingly aids or participates in its com-

mission. This question was passed upon in *Beck* v. *U. S.*, 33 F. (2d) 107, in a mail fraud case. With regard to the introduction of evidence as to misrepresentations made by salesmen, the court said, in part:

> "Over repeated and vigorous objections, the court admitted evidence of conversations between a great many contract holders and a number of salesmen employed by the company, not had in the presence of Beck and not shown to have been authorized by him. The court announced early in the trial the theory on which the case was tried: 'But the ruling of the court is, what Mr. Barrett may have said or what the officers of the company of which he was president may have said, in the discharge of their duties in connection with that company, are binding upon the defendant'. This ruling was upon the evidence of one Shea, who was not an officer, but a salesman, and was adhered to throughout the trial.
>
> In our opinion, this was error; if error, it was highly prejudicial, for the recollections of a procession of contract holders, mostly women, who had lost their money, of oral promises and representations made some four years before, were lurid and vivid. Guilt is personal and not vicarious. Except for certain regulatory offenses not involving moral turpitude, it is always an axiom of the criminal law that criminal intent is an essential ingredient of crime. It must be true that no man can be held liable for a false pretense or promise if he neither made the pretense nor authorized it. * * *
>
> There was much evidence of that kind; e. g., contract holders testified that sales agents promised their houses would be completed in so many days and there was no proof that Beck authorized the promise or ever knew it had been made. As to some of these, material was on the ground and work begun prior to receivership. This testimony seems to be prejudicial as well as immaterial."

The indictment must allege not only that the persons devised a scheme or artifice to defraud, but must allege

clearly and distinctly what the artifice was, wherein the fraud consisted, and the circumstances by which it was to be accomplished. *U. S.* vs. *Hess*, 124 U. S. 483, 31 L. Ed. 516. The government elected to charge and assumed the burden of showing the falsity of the extravagant representations set out. No witness testified that he ever saw or knew the location of any land sold or offered for sale; there is no evidence in this record as to the character or value of any land sold or offered for sale; there is not a scintilla of evidence that the lands sold or offered for sale were, as the indictment charged, waste lands, unfit for any purpose, or that they were worthless, or that no development of any character was ever had in the area where they were located, or that they were hilly, waste lands, or that they were absolutely barren and would not produce any character of vegetation. The government must prove the falsity of the extravagant representations. *Little* vs. *U. S.*, 73 F. (2d) 861. It might truthfully be said that the government fell as far short of proving the falsity of the extravagant representations alleged in the indictment as the petitioner did at the trial to support the alleged false representations made by Summerfield to the purchasers of land.

The government did not discharge the burden of showing by substantial evidence that petitioner devised the scheme and artifice alleged, and we are apprehensive of departure from or relaxation of the settled rules for the trial of criminal cases, and think this case should be reviewed and reversed.

Respectfully submitted,

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HOWARD DAILEY,
RUSSELL ALLEN,
Of Counsel.

APPENDIX.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 9293.

ALVA B. DAVIS, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States for the Northern District of Texas.

(June 28, 1940.)

Before Foster, Hutcheson and Holmes, Circuit Judges.

FOSTER, *Circuit Judge:*

Appellant, Alva B. Davis, and L. J. Summerfield, were convicted on 13 counts of an indictment charging fraudulent use of the mails and were given general sentences of two years imprisonment. Summerfield has not appealed.

The fraudulent scheme charged was the selling of land in Brewster and Presidio counties, Texas, for approximately $10 an acre, to about 1000 purchasers, through misrepresentations as to its future potential unknown mineral possibilities and its value for agricultural purposes, when in truth the land was not worth over $1.00 to $1.50 an acre. The case was tried by the judge without intervention of a jury. The printed record consists of some 550 pages but we will not attempt to review the evidence as it is not suggested it was insufficient to support the conviction. The errors assigned are purely technical and do not affect the substantial rights of appellant. Furthermore, they are without merit.

The record presents no reversible error. 28 U. S. C. A. Section 391. The judgment is Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 357

ALVA B. DAVIS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 556–557) is reported in 112 F. (2d) 926.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 28, 1940 (R. 557). A petition for rehearing (R. 558–562) was denied August 2, 1940 (R. 563). The petition for a writ of certiorari was filed August 21, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of

February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the petitioner is entitled to urge that error was committed in the overruling of a motion for continuance which he asserts was made on the day the trial commenced.

2. Whether the petitioner is entitled to secure a review of the sufficiency of the evidence.

STATEMENT

On September 21, 1939, an indictment in 14 counts was returned against the petitioner and another in the District Court for the Northern District of Texas (R. 1–44). The first 13 counts charged violations of the mail fraud statute (U. S. C., Title 18, Sec. 338); the fourteenth charged a conspiracy to violate that statute (U. S. C., Title 18, Sec. 88). The fraudulent scheme charged was aptly described in the opinion below as "the selling of land in Brewster and Presidio counties, Texas, for approximately $10 an acre, to about 1,000 purchasers, through misrepresentations as to its future potential unknown mineral possibilities and its value for agricultural purposes, when in truth the land was not worth over $1.00 to $1.50 an acre" (R. 557).

On September 23, 1939, the petitioner was arraigned and pleaded not guilty, and the case was

set for trial on September 27 (R. 58). On the same day petitioner moved for a continuance, which motion was overruled (R. 54–57). On October 2 the case came on for trial before the court, the petitioner having waived a trial by jury (R. 58–59, 97). Petitioner was found guilty by the court upon all counts, except the fifth (R. 548), and was sentenced to imprisonment for two years and fined $5,000 (R. 59). Petitioner's conviction was unanimously affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 556–557) and his petition for rehearing denied (R. 563).

ARGUMENT

I

Petitioner contends that error was committed by the trial court in denying a motion for continuance asserted to have been made by him on October 2, 1939, the day the trial commenced.[1] He concedes, however, that this motion and the ruling of the District Court thereon does not appear in the record and that the only reference to it contained in the record is found in his notice of appeal and assignment of errors (Br. 14–15).

Since petitioner's contention is predicated upon a purported ruling of the trial court which does not appear in the record, it is clear that the contention

[1] The petitioner does not now challenge the denial of his motion for continuance made on September 23, 1939.

cannot be made in an appellate court.[2] Moreover, we submit that the petitioner has failed to show any abuse of discretion by the trial court in overruling the motion for continuance upon which he relies. It is apparent (Br. 14) that the petitioner made no showing that he would be able to secure the presence of the witnesses in question within any reasonable time or, for that matter, that they would ever be available.

II

The petitioner is clearly not in a position to urge that the evidence was insufficient to sustain his conviction. Not only was the question of the sufficiency of the evidence not presented in the petitioner's assignment of errors in the court below (R. 81–97), but it does not appear from the record that any motion for an acquittal was made at the close of the case (R. 547–548). It is well settled that in such circumstances a review of the evidence is not required in an appellate court.[3]

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[2] *Claassen* v. *United States*, 142 U. S. 140, 147; *Price* v. *United States*, 74 F. (2d) 120 (C. C. A. 5th), certiorari denied, 294 U. S. 720; *Wolfle* v. *United States*, 64 F. (2d) 566, 567–568 (C. C. A. 9th), affirmed, 291 U. S. 7; *Lewis* v. *United States*, 92 F. (2d) 952 (C. C. A. 10th); *Wainer* v. *United States*, 87 F. (2d) 77, 80 (C. C. A. 7th), certiorari denied, 300 U. S. 669.

[3] *Herman* v. *United States*, 48 F. (2d) 479, 480 (C. C. A. 5th); *Massenberg* v. *United States*, 19 F. (2d) 62, 63 (C. C. A. 4th); *Rossi* v. *United States*, 9 F. (2d) 362, 365 (C. C. A. 8th); *Baldwin* v. *United States*, 5 F. (2d) 133, 134 (C. C. A. 6th), certiorari denied, 269 U. S. 552; Clements v. *United States*, 297 Fed. 206, 207 (C. C. A. 9th), certiorari denied, 266 U. S. 605.

There is clearly no merit in petitioner's contention that there was a complete lack of evidence to establish that the value of the lands in question was misrepresented or that petitioner was responsible for the alleged misrepresentations made by salesmen. (See Appendix summarizing the evidence with reference to these matters.) It is only where there is an entire failure of proof that an appellate court may afford relief in the absence of an appropriate motion in the trial court.[4]

CONCLUSION

Since no conflict of decisions is involved and there is presented no important question of federal law, we respectfully submit that the petition for writ of certiorari should be denied.

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O. JOHN ROGGE,
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SEPTEMBER, 1940.

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[4] *Williamson* v. *United States*, 207 U. S. 425, 452; *Clyatt* v. *United States*, 197 U. S. 207; *Wiborg* v. *United States*, 163 U. S. 632.

APPENDIX

SUMMARY OF EVIDENCE WITH REFERENCE TO THE FALSITY OF THE REPRESENTATIONS CONCERNING THE VALUE OF THE LANDS IN QUESTION AND THE PETITIONER'S RESPONSIBILITY FOR THESE REPRESENTATIONS

Lands were sold by the defendants for approximately $10 per acre (R. 109, 137, 245, 309, 437). The defendants induced various persons to purchase these lands by false representations and promises concerning the valuable investment these lands would constitute (R. 116, 121, 265, 214), the possibility of discovering oil, gas and other minerals in paying quantities (R. 152, 155, 157, 245–248, 276), the utility of the lands for the growing of various fruits and other crops (R. 119, 121, 148, 156, 170, 201, 310), and the prospect of enormous profits to be made by those who purchased the lands (R. 148, 161, 175, 246, 265–266).

That these representations were highly distorted and false is apparent from the evidence. It was shown that much of the land sold by the defendants was purchased for $0.75 and $1.15 an acre (R. 338, 340, 358); that it was worth no more (R. 358); that nothing had transpired in either of the counties where the land was located as to give it a prospective value of $10 per acre (R. 362, 529); that no commercially producing oil wells had been discovered in these counties (R. 356, 372–373, 380, 394); that as to some of the tracts sold (R. 260–263, 281–

285, 308) the mineral rights therein had long before been reserved exclusively to the State of Texas (R. 343–345, 349); and that the lands had little utility for the growing of fruit or any other agricultural products (R. 379, 399, 415, 528).

With reference to the petitioner's responsibility for the alleged misrepresentations, the record discloses that the petitioner prepared and furnished to all of his agents, including his codefendant, Summerfield, a prospectus which contained representations similar to those made by Summerfield and the other agents (R. 455, 458–475); that Summerfield was designated by the petitioner himself as his "good will ambassador" and "country wide representative" (R. 528–529); and that petitioner wrote to persons who had purchased lands from him advising that personal visits which he had planned would be made instead by Summerfield, who would discuss with the purchasers the various phases of their land investments (R. 159, 252). The petitioner himself wrote many letters to purchasers and prospective purchasers and these, as well as the prospectus which he prepared, contained numerous glaring and extravagant representations concerning the lands (R. 114–117, 154, 214, 219, 250, 269, 458–475).

U. S. GOVERNMENT PRINTING OFFICE: 1940